No. 83-1985

In The

Supreme Court of the United States

October Term, 1983

MARK DAVID FIELD,

Petitioner,

vs.

OMAHA STANDARD INC., SAVAGE TRUCK EQUIPMENT COMPANY, INTERNATIONAL HARVESTER COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT INTERNATIONAL HARVESTER COMPANY

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QUESTION PRESENTED

Whether the trial and appellate courts correctly applied the decisional law of Pennsylvania to the facts of the case presented in this diversity action in order to allow the jury properly to determine responsibility for an alleged defect existing in a product manufactured in stages by more than one entity?

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International Harvester Company respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 6, 1984.

STATEMENT OF THE CASE

This action arose out of a motor vehicle accident occurring in Pennsylvania in July of 1979. One of the vehicles involved in the accident was a mobile crane, or crane truck, originally purchased in 1971 as an off-the-road construction vehicle. The accident occurred when petitioner, Mark David Field, drove a pick-up truck into the rear of the crane truck while the latter was stopped on the highway waiting to make a left hand turn.

Mr. Field alleged that the injuries he sustained were caused by the crane truck. In particular, he claimed that it should have been equipped with a device to protect against rear underride, a term generally used to describe a collision in which the front end of the striking vehicle rides under the body of the struck vehicle. As a result, the striking vehicle sustains an impact to its windshield and roof area and an intrusion into its occupant compartment.

The base of the crane truck was a cab and chassis manufactured by International Harvester Company, respondent herein. A cab and chassis is nothing more than a motorized frame. In addition to the truck cab, it consists only of frame rails, a drive shaft, a rear axle, and wheels. Until a truck body is placed upon it, a cab and chassis is considered an incomplete vehicle and may not be driven on the public highways. This particular unit was sold to Troy's, Inc., a franchised but independent International Harvester dealer in Parkton, Maryland. Thereafter, Troy's completed the truck to order of its customer, Ryland Systems, by having other local business entities modify the frame (by lengthening the rails and drive shaft and moving the axle and wheel assemblies further rearward), install a truck body, and erect

a crane on it. Troy's then sold the completed vehicle to Ryland Systems.[1]

Mr. Field contends that International Harvester should be held accountable for the final configuration of the vehicle in spite of its limited role as the supplier of the cab and chassis unit. According to the expert witness who testified at trial on Mr. Field's behalf, International Harvester should have offered an underride guard kit as optional equipment to be purchased with the cab and chassis.[2]

In its defense, International Harvester introduced evidence to explain the manner in which large trucks are manufactured. Thus counsel elicited testimony to the effect that a cab and chassis is a multi-purpose component which can and does form the base for any number of truck configurations, such as trash collectors or beverage trucks. Because the vehicle bodies for many of those configurations extend to the level of the rear axle or lower, a specific component for protection against rear underride is often incompatible with and unsuitable for the vehicle. Typically, as was the case herein, the cab and chassis manufacturer is not aware of the planned end use for the vehicle. As a result, it is not in a position to know whether an underride guard would serve any purpose, or whether it might interfere in the function of the vehicle, as for example in the case of a garbage truck. Thus, the custom and practice developed in the trucking industry is for the final

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1. Neither Troy's nor Ryland Systems was made a party to the litigation.

2. Interestingly, the availability of such an option would have had no bearing on subsequent events. Chester Troy, the principal owner of Troy's and the individual involved in the 1971 transaction, was also a witness for the plaintiff. He testified, however, that he would not have recommended that Ryland purchase an underride guard as it would have interfered with the vehicle's off-the-road use.

stage manufacturer, the body builder, to provide underride protection, equipping the vehicle with a separate component when necessary.

After ten days of trial the jury returned a verdict in favor of International Harvester, stating in response to a special interrogatory that the product in question was not in a defective condition at the time it left the defendant's possession and control. Post trial motions were denied, and the Court of Appeals affirmed.

SUMMARY OF ARGUMENT

This diversity action is one in which the district court applied legal principles developed in Pennsylvania decisional law interpreting §402A of the Restatement (Second) of the Law of Torts. Neither did the court disregard precedent nor is its decision in conflict with any other cases involving the application of Pennsylvania law.

The decisions below of the District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals, which courts are not unfamiliar with the development and application of product liability law in Pennsylvania jurisprudence, provided for the proper presentation of the relevant issues to the jury whose decision should not now be disturbed.

ARGUMENT

The crux of petitioner's position is that the United States District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals erred in deciding that *Verge v. Ford Motor Company,* 581 F.2d 384 (3d Cir. 1978), is properly to be accorded precedential value in the case *sub judice.* Petitioner's dual claim is that *Verge* misapplies the principles of §402A of the Restatement (Second) of the Law of Torts (1965) in general (Petition at 11 ff.) and that *Verge* is contrary to the law of product liability as expressed in Pennsylvania appellate decisions, in particular (Petition at 30 ff.). Neither of these positions is supportable. Rather, a review of the development of product liability law in Pennsylvania and of the authorities cited by petitioner suggests that *Verge* is in keeping with the basic tort principles underlying the cornerstone of product liability as expressed in §402A of the Restatement.

Petitioner's contention that "New Jersey Cases have considered *Verge* and have decided *not* to follow it" (Petition at 27), is not accurate. In *Michalko v. Cooke Color and Chemical Corp.*, 91 N.J. 386, 451 A.2d 179 (1982), the Supreme Court of New Jersey did, indeed, distinguish *Verge* on its facts. However, the court did not signify any disapproval of *Verge* in so doing. Such is to be expected in cases involving various factual situations and distinctions which need be treated individually. In fact, the Third Circuit itself has distinguished *Verge* on its facts. *Cf. Heckman v. The Federal Press Company,* 587 F.2d 612 (3d Cir. 1978). Moreover, the reasoning employed by the Third Circuit Court of Appeals in *Verge* was relied upon by the Superior Court of New Jersey in *Mott v. Callahan Ams Machine Co.*, 174 N.J. Super. 202, 416 A.2d 57 (1980).

While it is significant that no court of any jurisdiction has questioned the propriety of the holding and analysis employed

in *Verge*,[3] the jurisdiction with which we are particularly concerned is Pennsylvania. There, the Pennsylvania Superior Court referred to *Verge*, though briefly, in a favorable manner. *Burch v. Sears Roebuck and Co.*, 467 A.2d 615, 622 (Pa. Super. 1983). Since the Pennsylvania appellate court specifically made mention of the *Verge* decision without disapproving it, petitioner's contention that "*Verge* has already been inferentially reversed by the Superior Court in *Burch*" (Petition at 39) is erroneous and wholly unfounded.

The concept which petitioner finds so unjust is a simple equality between responsibility for the existence of a defect and responsibility for the injuries allegedly resulting from it. Nothing in §402A or in the decisions adopting and relying upon it can be said to deviate from that fundamental precept. All of the opinions quoted by petitioner, which contain broad references to liability of all suppliers of a defective product, were rendered in cases involving a product manufactured in a single stage. Petitioner's reliance upon them misses the central point in this case. The jury concluded that the product manufactured by International Harvester, *i.e.*, the cab and chassis unit, was not defective. In the language of *Azzarello v. Black Brothers Co. Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978), the first opinion to contain the jury instruction now standard in Pennsylvania products actions, the cab and chassis did not lack an element necessary to make it safe for use, in this case rear underride protection.

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3. The reasoning and analysis employed in *Verge* has, in fact, been relied upon in several cases both within the federal court system, *see Powell v. E.W. Bliss Company*, 529 F. Supp. 48 (E.D. Pa. 1981); *Christner v. E.W. Bliss Company*, 524 F. Supp. 1122 (M.D. Pa. 1981); *Orion Insurance Company, Ltd. v. United Technologies Corp.*, 502 F. Supp. 173 (E.D. Pa. 1980); *Mayberry v. Akron Rubber Machinery Corporation*, 483 F. Supp. 407 (N.D. Okla. 1979), and in the courts of other states, in addition to Pennsylvania and New Jersey. *See Ford v. International Harvester Co.*, 430 So. 2d 912 (Fla. App. 3 Dist. 1983); *Elliott v. Century Chevrolet Co.*, 597 S.W. 2d 563 (Tex. Civ. App. 1980).

It seems fairly obvious that in order to make that determination the jury needed some basic information, such as the customary method of manufacturing large trucks, the relative expertise of the entities involved in the various stages of manufacture, and the practicality of attaching underride protection at any one particular stage. Those are of course the very factors enunciated by the Court of Appeals in *Verge* and followed by the trial court here. That sensible approach to the problem is said by petitioner to be contrary to Pennsylvania law. It is his position that the focus of the inquiry should not be the condition of the product at the time of its manufacture. It should instead be limited to whether the vehicle was in a defective condition at the time of the accident. Under petitioner's version of the law, an affirmative response to that question imposes liability upon every entity which supplied a component part of the product, regardless of that component's role in producing the injury.[4]

Petitioner attempts to portray the district court and Court of Appeals as violating a long line of cases which require federal courts, sitting in diversity cases, to follow the substantive law of the states (Petition at 8 ff.). It is clear, however, that the case herein presented involves nothing more than an application of the law of product liability as such currently exists in Pennsylvania. As the precise factual situation has not specifically been addressed by the Pennsylvania Supreme Court, it represents one in which the federal courts must use a measure of predictive interpretation of the outcome had the same factual situation been presented

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4. Any attempt to limit the group of potentially liable component suppliers in a case such as this one where an allegedly necessary safety device is lacking would inevitably result in a discussion of negligence concepts. That is considered anathema to plaintiffs in products litigation, and in this action would all but defeat petitioner's claim for damages, resulting as they did from injuries he caused to himself.

in the state courts.[5] The district courts and the Third Circuit Court of Appeals, sitting in Pennsylvania, are at least as well equipped to do this as is any other federal court, having been faced with this task on numerous occasions.[6]

Petitioner's rather bold statement that "no court could presume that the instant makeup of the Supreme Court would apply a *Verge* type analysis to the instant case"[7] is itself quite presumptuous. It should be pointed out that of the seven justices who decided *Azzarello v. Black Brothers,* considered the most liberal Pennsylvania decision attempting to interpret §402A, only one now remains on the Pennsylvania Supreme Court. And in the five years since *Azzarello* was decided, that court's most significant decision in the area of products liability has been *Sherk*

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5. *Cf. Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 204, 76 S. Ct. 273, 277, 100 L. Ed. 199 (1956); *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896-97 (3d Cir. 1983).

6. *See, e.g., Hammond v. International Harvester Co.*, 691 F.2d 646 (3d Cir. 1982); *Merriweather v. E.W. Bliss Co.*, 636 F.2d 42 (3d Cir. 1980); *Bailey v. Atlas Powder Co.*, 602 F.2d 585 (3d Cir. 1979). Apropos of which Your Honorable Court has noted as follows:

> "Since the federal judge making those findings is from the Vermont Bar, we give special weight to his statement of what the Vermont law is."

Bernhardt, note 5, *supra,* at 204, 76 S. Ct. at 277. In the case *sub judice,* the Third Circuit Court of Appeals sits in Philadelphia, Pennsylvania, as does the District Court for the Eastern District of Pennsylvania. The district judge who decided the case, Louis C. Bechtle, is from the Pennsylvania bar, as is A. Leon Higginbotham, Jr., the author of *Verge* who also sat on the appellate panel in this case.

7. Petition at 30 (emphasis deleted).

v. Daisy Hedden, 498 Pa. 594, 450 A.2d 615 (1982), one which can hardly be said to have expressed a plaintiff's viewpoint, resulting as it did in the entry of judgment for the defendant as a matter of law. Even the dissent in *Sherk* criticized *Azzarello*.

Finally, petitioner's attempt to characterize this case as involving a federal question of some significance is groundless. The Interstate Commerce Commission regulation requiring rear underride protection on certain types of vehicles has been in effect more than thirty years.[8] There is no evidence either of record or otherwise to suggest that the regulation has been ineffective or that truck manufacturers are acting to circumvent it. Petitioner's allegations are therefore without factual basis, and have no relevance whatsoever to the matter at issue.

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8. 49 C.F.R. §393.86, quoted in full by petitioner (Petition at 2-3).

CONCLUSION

In sum, this action does not involve an issue of general significance or one on which there is a split among the federal and/or state appellate courts. Petitioner's assertions to the contrary notwithstanding, the six years since the *Verge* decision have not seen an end to products liability. Far from sharing plaintiff's view of impending doom, those courts which have considered a factual situation similar to the one presented here have found the *Verge* approach to the problem a sensible and rational one.[9] This Court should not therefore exercise its jurisdiction to review the decision by the Court of Appeals.

Respectfully submitted,

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9. The *Verge* analysis has been applied by courts within the Tenth Circuit of the federal system and by courts within the States of Florida, New Jersey and Texas. *See* footnote 3, *supra*, and accompanying text.